STATE OF MICHIGAN

COURT OF APPEALS

KEITH LIDDY and VIRGINIA LIDDY,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORPORATION, MOSES ABRAHAM, and ROSE ANNE DAVIS,

Defendants-Appellees.

UNPUBLISHED
September 20, 2005

No. 262176
Wayne Circuit Court
LC No. 03-322738-CZ

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants. The trial court determined that no genuine issues of material fact existed with respect to plaintiff Keith Liddy's wrongful termination/breach of contract and age discrimination claims,[1] and additionally rejected plaintiffs' contention that outstanding discovery issues precluded summary disposition. We affirm.

Plaintiff was a long-time General Motors employee, having originally been hired in 1968 as an hourly worker. In 1984, plaintiff was promoted to a salaried employee position and, in 1989, became a seventh-level general supervisor. Plaintiff was terminated in August 2001 for violating General Motors' e-mail policy, which had been disseminated to employees in January 2001, and which indicated that violations could result in discipline up to and including discharge. Plaintiff's termination stemmed from an investigation into inappropriate e-mail usage that began in June 2001 when an employee of General Motors' World Wide Facilities Group sent an inappropriate e-mail to an employee in another group. During the investigation, several people were determined to have sent e-mails that violated the company's e-mail policy. Plaintiff admitted sending four sexually-oriented e-mails to a number of individuals through General Motors' e-mail system, contrary to the company's policy. At the time of plaintiff's termination, another employee, Linda Slupe, was also terminated. Like plaintiff, Slupe, who was older than plaintiff, sent four sexually-oriented e-mails to numerous recipients. Two other employees, both

[1] Plaintiff Virginia Liddy brought only a derivative claim for loss of consortium. For that reason, the singular term "plaintiff" refers only to plaintiff Keith Liddy.

of whom were also older than plaintiff, were not terminated for violating the policy. However, these individuals were determined to have sent only one inappropriate e-mail to a single recipient. Following the investigation, a contract employee, whose age was not disclosed on the record, was also informed that he could no longer work in General Motors' facilities because of his violations of the company's e-mail policy.

In July 2003, plaintiff and his wife filed the instant suit alleging wrongful termination/breach of contract, age discrimination, and loss of consortium. The trial court granted summary disposition of each of these claims in favor of defendants pursuant to MCR 2.116(C)(10).

A decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a trial court's decision to grant a motion for summary disposition, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The court should grant the motion only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff first argues that summary disposition of his claim for wrongful termination/breach of contract was improper. Specifically, plaintiff argues that he was never informed that he was an at-will employee, and that statements by his superiors and his thirty-three-year employment history led him to believe that he could be fired only for just cause.

"Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). However, the presumption of employment at will may be rebutted by:

> (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause", (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [*Id*. at 164 (citations omitted).]

In resolving the issue whether an employee has demonstrated a legitimate expectation of job security, an inquiry must be made into what, if anything, the employer promised and whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employee. *Id*. at 164-165, citing *Rood v General Dynamics Corp*, 444 Mich 107, 138-139; 507 NW2d 591 (1993).

In this case, plaintiff signed a compensation statement with defendant in 2000. The statement indicates that it was part of plaintiff's "employment agreement," that plaintiff was a month-to-month employee, and that the new statement replaced any previous compensation statement and would continue in effect until either the employment agreement or plaintiff's

employment was terminated. Plaintiff signed substantially similar statements in each year of his employ with General Motors from 1994 forward. The compensation statements contain a complete integration clause and indicate that no modifications or amendments, other than a cancellation and replacement by another written compensation statement, would be effective unless signed by both plaintiff and his employer. The General Motors employee handbook similarly indicates that regular employees were employed on a month-to-month basis and that, consistent with an at-will employment relationship, either the employee or the company could take the initiative to end the relationship. The written agreement and the handbook created an at-will employment relationship. *Schultes v Naylor*, 195 Mich App 640, 643; 491 NW2d 240 (1992); *Singal v General Motors Corp*, 179 Mich App 497, 504-505; 447 NW2d 152 (1989). Plaintiff failed to submit any evidence refuting his at-will employment status. He failed to present evidence that he had a written or oral agreement for just-cause employment, that he had a legitimate expectation of job security, or that he had a contract for a definite term of employment. *Lytle*, *supra*. Because plaintiff was an at-will employee and failed to establish a genuine issue of material fact to the contrary, summary disposition of his claim for wrongful termination/breach of contract was appropriate.

Summary disposition of plaintiff's age discrimination claim was also appropriate. Proof of discrimination in violation of § 202 of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, may be established by direct evidence or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). This case involves a claim based on alleged circumstantial evidence. "In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)." *Id*. at 133-134. The burden-shifting approach applies to claims of race, sex, and age discrimination under the Civil Rights Act. *Venable v General Motors Corp (On Remand)*, 253 Mich App 473, 476; 656 NW2d 188 (2002). To establish a rebuttable, prima facie case of age discrimination, a plaintiff must present evidence that (1) he is a member of a protected class, (2) he was subject to an adverse employment action, (3) he was qualified for his position, and (4) others, similarly situated and outside of the protected class, were not treated in a similar manner for the same conduct. *Id*. at 476-477; see also *Hazle v Ford Motor Co*, 464 Mich 456, 463 n 6; 628 NW2d 515 (2001) (the elements of the *McDonnell Douglas* prima facie case "should be tailored to fit the factual situation at hand"). Once a plaintiff has presented a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Hazle*, *supra* at 464. If a defendant produces such evidence, the presumption is rebutted and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons but a pretext for discrimination. *Id*. at 464-465.

Plaintiff has not established a material question of fact with respect to his prima facie case. It is undisputed that the fifty-one-year-old plaintiff was in a protected class based on his age. It is also undisputed that plaintiff was terminated and that he was qualified for his job. However, plaintiff has not produced any evidence to support his claim that he was terminated under circumstances giving rise to an inference of unlawful discrimination based on his age. The evidence revealed that both plaintiff and an older employee were terminated for violating General Motors' e-mail policy in 2001, and that a contract employee whose age was unknown lost his ability to work at General Motors' facilities after also violating the policy in 2001. The evidence further revealed that two employees who were older than plaintiff were disciplined but

not terminated for violating the policy in 2001, and that several other people, including one younger employee, have been terminated for violating the e-mail policy since 2001. Plaintiff produced no evidence that younger employees who violated the e-mail policy in a similar manner were spared termination while he, as an older employee, was not. Plaintiff's subjective belief that he was discriminated against because of his age is insufficient to create a genuine issue of material fact concerning whether defendants relied on age animus in terminating him. *Id*. at 476-477. Consequently, summary disposition was proper.

In a separate, but related argument, plaintiffs argue that they could not produce the evidence necessary to support the age discrimination claim because they were not provided with necessary discovery. On the date set for completion of discovery, plaintiffs filed a request for production of documents. In relevant part, they sought documentation prepared by defendant Rose Anne Davis related to the investigations of General Motors employees accused of violating the e-mail policy since January 2001. Defendants responded to the request the next day by letter and indicated that a protective order was necessary before information related to other employees would be produced. A proposed order was forwarded to plaintiffs' counsel. Plaintiffs' counsel, however, never responded to the request for a protective order. Defense counsel subsequently filed a timely response to plaintiffs' request for production of documents and objected to the request related to information about other employees, reiterating that a protective order was necessary before such information would be produced. Plaintiffs again took no action after receiving the response.

Several months later, at oral arguments on defendants' motion for summary disposition, plaintiffs' counsel raised the missing discovery as an issue for the first time. He argued that summary disposition was inappropriate because the documents were not provided. The trial court disagreed, noting that discovery was closed, that plaintiffs failed to sign a protective order, and that plaintiffs never moved to compel discovery. Plaintiffs later moved for reconsideration of the trial court's summary disposition order, claiming that defendants had no right to request a protective order without moving for one under MCR 2.302(C). Plaintiffs claimed that, because defendants had committed a discovery violation, discovery should be ordered and summary disposition should be denied. The trial court denied the motion for reconsideration.

Contrary to plaintiffs' argument, defendants were not required to move for a protective order under MCR 2.302(C). MCR 2.310, which governs requests to produce, provides that a responding party may agree to the requests or object to them. MCR 2.310(C)(2). In the alternative, MCR 2.310(C)(4) provides that the responding party "may" seek a protective order under MCR 2.302(C). The use of the language "may" indicates a discretionary action. *AFSCME v Highland Park Bd of Ed*, 214 Mich App 182, 186; 542 NW2d 333 (1995). Where an objection to a request to produce is made, the requesting party can move to compel discovery under MCR 2.313(A). See MCR 2.310(C)(3). In deciding a motion to compel, a trial court may enter a protective order. See MCR 2.313(A)(3).

Defendants' response, objecting to the request to produce, was appropriate. MCR 2.310(C)(2). Plaintiffs never moved to compel the outstanding discovery, and they never raised the discovery issue until the time of oral argument on defendants' motion for summary disposition, which was more than four months after the close of discovery. At that time, plaintiffs sought to defeat summary disposition by arguing that the outstanding discovery would support their case. However, they did not show, and have not shown on appeal, that any

outstanding discovery would create a genuine issue of material fact. Plaintiffs merely speculate in this regard. A party's right to pretrial discovery is subject to the trial court's duty to control the flow of litigation. *Klabunde v Stanley*, 384 Mich 276, 281; 181 NW2d 918 (1970). Because plaintiffs failed to move to compel discovery in a timely fashion, failed to sign the protective order, the validity of which is not at issue, and failed to make any showing that their claim would have merit if the outstanding discovery was produced, we reject their claim that summary disposition was inappropriate because of a discovery violation. The trial court did not abuse its discretion in denying the outstanding discovery before ruling on the motion for summary disposition. See *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder